

**IN THE UNITED STATES BANKRUPTCY COURT FOR THE
EASTERN DISTRICT OF TENNESSEE**

In re

Case No. 03-36838

STEPHEN WYN DUPUY

Debtor

MEMORANDUM ON MOTION TO REOPEN CASE

APPEARANCES: BARRETT LEGAL GROUP, LLC
Thomas H. Barrett, II, Esq.
Post Office Box 920
Newark, Ohio 43058-0920
Attorneys for Unizan Bank, National Association

STEPHEN WYN DUPUY
410 South Tennessee Avenue
LaFollette, Tennessee 37766
Pro Se

GWENDOLYN M. KERNEY, ESQ.
Post Office Box 228
Knoxville, Tennessee 37901-0227
Chapter 13 Trustee

RICHARD STAIR, JR.
UNITED STATES BANKRUPTCY JUDGE

Presently before the court is the Motion of Creditor Unizan Bank, National Association to Reopen Case (Motion), filed on February 20, 2004, by Unizan Bank, National Association (Unizan Bank), a secured creditor of the Debtor. By the Motion, Unizan Bank requests that the court reopen the Debtor's Chapter 13 bankruptcy case to allow for the adjudication of an automatic stay motion filed prior to dismissal of the bankruptcy case. Because the bankruptcy case has not been closed, and thus, need not be reopened, the court, for reasons hereinafter discussed, will deem Unizan Bank's Motion as a request for relief from an order under Federal Rule of Civil Procedure 60(b)(6), made applicable to this bankruptcy case pursuant to Federal Rule of Bankruptcy Procedure 9024.

This is a core proceeding. 28 U.S.C.A. § 157(b)(2)(A) and (O) (West 1993).

I

The Debtor filed a pro se Voluntary Petition commencing his Chapter 13 bankruptcy case on December 17, 2003. He did not file a Chapter 13 plan or any statements and schedules with the petition. Additionally, the Debtor did not pay the required filing fee, and instead, he filed an Application to Pay Filing Fee in Installments, proposing to pay the entire fee by January 30, 2004. On December 29, 2003, the court entered an Order directing the Debtor to file his plan, statements and schedules within fifteen days of the petition date, as required by Rules 1007(c) and 3015(b) of the Federal Rules of Bankruptcy Procedure. Pursuant to this Order, the Debtor was advised that his failure to file the required documents could result in dismissal of his bankruptcy case without further notice or hearing. Likewise,

on December 29, 2003, the court entered an Order Approving Payment of Filing Fee in Installments.

On January 5, 2004, Unizan Bank filed the Motion of Creditor Unizan Bank, National Association for Annulment of Automatic Stay of Section 362 (Motion to Annul). In support of the Motion to Annul, Unizan Bank set forth an extensive history of scheduled foreclosures and bankruptcy filings beginning in October 1999. Since that time, Unizan Bank averred that the Debtor has filed six bankruptcy cases, all with the sole purpose of thwarting its efforts to foreclose upon a mortgage on the Debtor's residence. Most recently, Unizan Bank averred that the Debtor filed this Chapter 13 case two minutes prior to a sheriff's sale in Miami County, Ohio. The sale proceeded without knowledge of the Debtor's bankruptcy filing, and Unizan Bank filed its Motion to Annul, seeking annulment of the automatic stay in order to allow confirmation of the sheriff's sale.

On January 8, 2004, the bankruptcy court clerk issued a Notice to Parties in Interest, setting the hearing on Unizan Bank's Motion to Annul for January 21, 2004. The hearing was not held, however, because on January 9, 2004, the court entered an Order dismissing the Debtor's bankruptcy case for failure to file a Chapter 13 plan or any statements and schedules as directed by the court's December 29, 2003 Order (Dismissal Order). The Chapter 13 Trustee filed her Final Report on January 29, 2004, but the case has not yet been closed.

On February 20, 2004, Unizan Bank filed the present Motion, contending that the court should not have dismissed the Debtor's bankruptcy case prior to ruling on its pending

Motion to Annul and requesting adjudication thereof. In support of its Motion, Unizan Bank states that on January 29, 2004, it obtained a Judgment Entry Confirming Sale and Ordering Deed and Distribution in the Court of Common Pleas of Miami County, Ohio. The Debtor then served Unizan Bank with a motion to set aside the judgment on February 14, 2004, arguing that the automatic stay rendered the December 17, 2003 foreclosure sale “illegal.”

Unizan Bank also makes the following statements and requests for relief:

9. The time has come for this Court to put an end to the Debtor’s obvious shenanigans, once and for all. The Debtor has proven by his repeated actions that he thinks that filing Chapter 13 Petitions shortly before sheriff’s sales are due to occur is clever. It is not clever; it is merely tedious and unbelievably self-centered. The bona fide purchasers of the Premises at the sheriff’s sale, Mary R. Oen and David P. Kramer, have no ax to grind with the Debtor yet they are now being dragged by the Debtor into his self-created and self-inflicted morass.

10. Unizan respectfully submits that this Court should not have dismissed this action without first ruling upon Unizan’s Motion for Annulment of Automatic Stay of Section 362; indeed, the Court’s act of doing so fell right into the Debtor’s plans. The Debtor clearly had no intent of completing or even proposing a Chapter 13 Plan – rather, the Debtor’s sole aim in filing his Petition was to achieve the cancellation, yet again, of the pending sheriff’s sale. This Court should do now what it should have done before. The Court should reopen this case and then grant Unizan’s Motion for Annulment of Automatic Stay of Section 362.

II

As an initial matter, Unizan Bank’s Motion incorrectly seeks to reopen the Debtor’s Chapter 13 bankruptcy case pursuant to 11 U.S.C.A. § 350(b) (West 1993), which provides that “[a] case may be reopened in the court in which such case was closed to administer assets, to accord relief to the debtor, or for other cause.” 11 U.S.C.A. § 350(b). An obvious

prerequisite for reopening a case under § 350(b) is that a case has been closed and fully administered. *See, e.g., In re Kent Funding Corp.*, 290 B.R. 471, 475 (Bankr. E.D.N.Y. 2003); *In re King*, 214 B.R. 334, 336 (Bankr. W.D. Tenn. 1997). Here, a Final Decree closing the case has not been entered, and the case cannot, therefore, be reopened.

Nevertheless, Unizan Bank is not without recourse. The Motion states, in detail, Unizan Bank's averments that the Debtor filed this case in bad faith. Additionally, as previously stated, Unizan Bank argues that the court should not have dismissed the Debtor's bankruptcy case without first ruling on the Motion to Annul. Clearly, the averments in its Motion indicates that Unizan Bank is requesting the type of relief set forth in Rule 60(b); i.e., relief from the Dismissal Order entered on January 9, 2004. Therefore, based upon the relief sought and the averments set forth in its Motion, the court will deem Unizan Bank's Motion to Reopen as a motion for relief from the Dismissal Order entered on January 9, 2004, made pursuant to Rule 60(b).

III

Federal Rule of Civil Procedure 60(b) provides, in material part, that "[o]n motion and upon such terms as are just, the court may relieve a party . . . from a final judgment, order, or proceeding for . . . (6) any other reason justifying relief from the operation of the judgment." FED. R. CIV. P. 60(b). Rule 60(b)(6) "applies 'only in exceptional or extraordinary circumstances' . . . because 'almost every conceivable ground for relief is covered' under the other subsections of Rule 60(b)." *Blue Diamond Coal Co. v. Trs. of the*

UMWA Combined Benefit Fund, 249 F.3d 519, 524 (6th Cir. 2001) (quoting *Olle v. Henry & Wright Corp.*, 910 F.2d 357, 365 (6th Cir. 1990)). “Consequently, courts must apply Rule 60(b)(6) relief only in ‘unusual and extreme situations where principles of equity mandate relief.’” *Blue Diamond*, 249 F.3d at 524 (quoting *Olle*, 910 F.2d at 365). Rule 60(b)(6) “does not particularize the factors that justify relief, but [the Supreme Court has] previously noted that [Rule 60(b)(6)] provides courts with authority ‘adequate to enable them to vacate judgments whenever such action is appropriate to accomplish justice,’ while also cautioning that it should only be applied in ‘extraordinary circumstances.’” *Olle*, 910 F.2d at 366 (quoting *Liljeberg v. Health Servs. Acquisition Corp.*, 108 S. Ct. 2194, 2204 (1988) (citations and footnote omitted)). The party requesting Rule 60(b) relief bears the burden of establishing all prerequisites associated therewith. *McCurry v. Adventist Health Sys./Sunbelt, Inc.*, 298 F.3d 586, 592 (6th Cir. 2002).

The facts of this case presented by Unizan Bank in its Motion, together with those presented in its Motion to Annul, appear to exude the type of extraordinary circumstances justifying relief. Since October 1999, the Debtor has filed for relief under Chapter 13 six times.¹ While the court is not making a determination of the merits of Unizan Bank’s Motion to Annul, the court recognizes that the Motion to Annul was pending when the Dismissal

¹ The court takes judicial notice that five of the six cases, No. 99-34073 filed October 5, 1999, No. 99-34743 filed November 19, 2003, No. 01-33871 filed August 9, 2001, No. 02-30937 filed February 22, 2002, and the present case filed December 17, 2003, were all filed in this court. In its Motion to Annul, Unizan Bank avers that the sixth case was filed by the Debtor on September 5, 2003, in the Bankruptcy Court for the Southern District of Ohio in the Western Division at Dayton and was assigned case No. 03-37865. Appended to the Motion to Annul is a copy of the October 27, 2003 Ohio Bankruptcy Court’s order entered in case No. 03-37865 dismissing the Debtor’s case “without prejudice to refiling.”

Order was entered, and in fact, had been set for hearing on January 21, 2004. The sole purpose of the Motion to Annul was to confirm the sheriff's sale which occurred in Ohio on December 17, 2003. Based upon the Motion filed by Unizan Bank, the court agrees that equity mandates that the court adjudicate the merits of the Motion to Annul, and vacation of the Dismissal Order entered on January 9, 2004 is warranted. The Debtor's Chapter 13 bankruptcy case shall be reinstated, and the automatic stay shall again be in effect. Additionally, an evidentiary hearing will be set on Unizan Bank's Motion to Annul.

An order consistent with this Memorandum will be entered.

FILED: March 2, 2004

BY THE COURT

/s/ Richard Stair, Jr.

RICHARD STAIR, JR.
UNITED STATES BANKRUPTCY JUDGE

**IN THE UNITED STATES BANKRUPTCY COURT FOR THE
EASTERN DISTRICT OF TENNESSEE**

In re

Case No. 03-36838

STEPHEN WYN DUPUY

Debtor

ORDER

For the reasons stated in the Memorandum on Motion to Reopen Case filed this date, the court directs the following:

1. The Motion of Creditor Unizan Bank, National Association to Reopen Case filed by Unizan Bank, National Association on February 20, 2004, is deemed by the court to be a motion for relief from the Order entered on January 9, 2004, dismissing the Debtor's Chapter 13 case made pursuant to Rule 60(b)(6) of the Federal Rules of Civil Procedure, and applicable to this bankruptcy case by Rule 9024 of the Federal Rules of Bankruptcy Procedure.

2. The January 9, 2004 Order dismissing the Debtor's Chapter 13 case is VACATED.

3. A final hearing on the Motion of Creditor Unizan Bank, National Association for Annulment of Automatic Stay of Section 362 filed by Unizan Bank, National Association on January 5, 2004, will be held on March 17, 2004, at 1:30 p.m., in Bankruptcy Courtroom 1-C, First Floor, Howard H. Baker, Jr. United States Courthouse, Knoxville, Tennessee. This will be an evidentiary hearing.

4. Because compelling circumstances so require, the automatic stay shall remain in effect pending resolution of Unizan Bank, National Association's motion notwithstanding that the final hearing will be held beyond the time required by 11 U.S.C. § 362(e).

SO ORDERED.

ENTER: March 2, 2004

BY THE COURT

/s/ Richard Stair, Jr.

RICHARD STAIR, JR.
UNITED STATES BANKRUPTCY JUDGE